



CENTER FOR  
FOOD SAFETY

7/25/2016

National Freedom of Information Officer  
U.S. Environmental Protection Agency (EPA)  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
(202) 566-1667  
E-mail: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

**SUBMITTED VIA ONLINE SUBMISSION FORM**

**RE: Freedom of Information Act Request**

To the National Freedom of Information Officer:

The Center for Food Safety (CFS) is a 501(c)(3) nonprofit organization that addresses the impacts of our current industrial food production system on human health, animal welfare, and the environment. Consistent with this mission and pursuant to 40 C.F.R. Part 2 and the Freedom of Information Act, 5 U.S.C. § 552, I, Sylvia Wu, on behalf of CFS, respectfully request the following information:

**Any and all EPA assessment and decision-making documents associated with the EPA's assessment of the application for prothioconazole for new use on cotton as noticed by EPA in the Federal Register on December 17, 2015. 80 Fed. Reg. 78,729 (Dec. 17, 2015). These documents should include registration decisions, notices of issuances, ecological risk assessment and benefit assessment, as well as any formal or informal consultation with the Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS) under the Endangered Species Act (ESA).**

"All documents" includes but is not limited to all correspondence, minutes, memoranda, communications, reports and/or other documents received from or given to applicants in Nos. 1-9 above, or other governmental agencies, as well as maps, plans, drawings, emails, reports, databases, and phone notes. This request includes all documents that have ever been within your custody or control, whether they exist in agency "working," investigative, retired, electronic mail, or other files currently or at any other time.

CFS requests this information in light of the President's "Memorandum for the Heads of Executive Departments and Agencies" dated January 21, 2009, which states:

**NATIONAL HEADQUARTERS**

660 Pennsylvania Avenue, SE, Suite 302  
Washington, D.C. 20003  
T: 202-547-9359 F: 202-547-9429

**CALIFORNIA OFFICE**

303 Sacramento Street, 2nd Floor  
San Francisco, CA 94111  
T: 415-826-2770 F: 415-826-0507

**PACIFIC NORTHWEST OFFICE**

917 SW Oak Street, Suite 300  
Portland, OR 97205  
T: 971-271-7372 F: 971-271-7374

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The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails...In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public. All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA. The presumption of disclosure also means that agencies should take affirmative steps to make information public.

Exec. Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4,683 (Jan. 21, 2009). This request is being sent to the EPA FOIA officer with the understanding that it will be forwarded to other officers, offices, or departments with information pertinent to this request.

### **REQUEST FOR FEE-WAIVER**

CFS requests that pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), EPA waive all fees in connection with the procurement of this information. As demonstrated below, the nature of this request meets the test for fee waiver as expressed in the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(A)(iii).

The factors EPA must consider in deciding upon a fee waiver request are laid out in 40 C.F.R. § 2.107(l)(2), and those relating to a significant contribution to public understanding of the operations or activities of the government can be summarized as follows:

- (i) Whether the subject matter of the request concerns the operations or activities of the government.
- (ii) Whether the disclosure of the information will likely contribute to an understanding of the subject by the general public.
- (iii) Whether disclosure will contribute to a reasonably broad audience of persons interested in the subject.
- (iv) Whether the contribution to public understanding is significant.

40 C.F.R. § 2.107(l). These factors are to be balanced against one another; no one factor is determinative. *See Friends of the Coast Fork v. U.S. Dep't of Interior*, 110 F.3d 53, 55 (9th Cir. 1997).

The other requirements in the regulations—related to whether the requester has a commercial interest that outweighs a public interest motivation—are not applicable to CFS and this request. Under FOIA, a commercial interest is one that furthers a commercial, trade, or profit interest as those terms are commonly understood. *See, e.g., OMB Fee Guidelines*, 52 Fed.

Reg. 10017-18; *see also* 40 C.F.R. § 2.107(b)(1). Such interests are not present in this request. CFS does not seek information from EPA for commercial gain or interest. As a 501(c)(3) nonprofit organization, CFS has no commercial interest in EPA's involvement in the industry-led meeting of April 16, 2014.

In deciding whether the fee waiver criteria is satisfied, CFS respectfully reminds EPA that FOIA is inclined toward disclosure and that the fee waiver amendments were enacted to allow further disclosure to nonprofit, public interest organizations. *See* 132 Cong. Rec. S. 14270-01, (statement of Sen. Leahy) (“[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information.”). Furthermore, the Ninth Circuit Court of Appeals has interpreted this fee waiver section broadly, holding that the section “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy).

**I. The present disclosure is in the public interest because it will significantly contribute to public understanding of the operations or activities of government.**

The requested disclosure will contribute to public understanding of the operations or activities of the government. 5 U.S.C. § 552(a)(4)(A)(iii).

**A. The subject of the disclosure concerns “the operations and activities of the government.”**

The requested information pertains to the registration of fungicides under FIFRA, and specifically the process undertaken by EPA in approving fungicide registration applications. It is irrefutable that EPA's registration of fungicides under FIFRA is a clearly identifiable operation of the government. This disclosure will demonstrate to the public at large how EPA performs its statutory duties in deciding whether and under what conditions to register fungicides, particularly those containing prothioconazole.

**B. The disclosure is likely to contribute to public understanding.**

As discussed in the previous section, the present disclosure will provide the public a better understanding of EPA's registration of fungicides, an essential function EPA performs pursuant to FIFRA. The requested records will meaningfully inform the public about these government operations or activities in a way not currently available in the public domain. *See* 40 C.F.R. § 2.107(l)(2)(ii).

**C. The disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the subject.**

This disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the regulation of fungicides. *Id.* § 2.107(l)(2)(iii). CFS is a member-oriented

non-profit organization with over 700,000 members that works to address the impacts of the food system on human health, animal welfare, and the environment. Through over a decade of involvement in environmental litigation and policymaking as it relates to food, CFS has demonstrated its ability to take technical information provided by government agencies and distill it into a format that is accessible to the public.

CFS educates and counsels the public—via online action alerts, legal action, our website, our True Food Network, books and reports, and our quarterly newsletter, Food Safety Now!—on the harm done to human health, animal welfare, and the environment by industrial agriculture. Accordingly, CFS is an effective vehicle to disseminate information on fungicides and their impact on human health, animal health, and the environment.

CFS has had a constant role in educating the public about the dangers of systemic pesticides. CFS also facilitates members' ability to confront agency inaction, such as the hundreds of thousands of citizens who petitioned EPA to act upon a CFS formal petition and adopt emergency measures to slow the spread of colony-collapse disorder in honey bees.<sup>1</sup> CFS issued a formal report on the issue, *Pollinators & Pesticides: A Report by Center for Food Safety on Pollinator Health, Research, and Future Efforts for Pollinator Protection*.<sup>2</sup> In addition, CFS has delivered to EPA a petition with over half a million signatures urging EPA to follow the European Union's lead in recognizing the risk of neonicotinoid pesticides.<sup>3</sup> CFS also issued a report on widespread aquatic contamination by neonicotinoid insecticides, which threatens a range of aquatic invertebrates, including crabs and insects.<sup>4</sup> These reports and petitions are all available online to CFS members and the public-at-large, at no cost. CFS is in the process of creating a report on the potential risks of systemic fungicides such as

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<sup>1</sup> See Press Release, Center for Food Safety, 250,000+ to EPA: Time for Emergency Action on Pesticide to Protect Bees (June 28, 2012), <http://centerforfoodsafety.com/press-releases/713/250000-to-epa-time-for-emergency-action-on-pesticide-to-protect-bees>.

<sup>2</sup> See Reports, Center for Food Safety, *Pollinators & Pesticides: A Report by Center For Food Safety on Pollinator Health, Research, and Future Efforts for Pollinator Protection* (September 05, 2013), <http://www.centerforfoodsafety.com/reports/1771/pollinators-and-pesticides-a-report-by-center-for-food-safety-on-pollinator-health-research-and-future-efforts-for-pollinator-protection>.

<sup>3</sup> See Press Release, Center for Food Safety, Half a Million Demand Action from EPA to Save Bees (Mar. 21, 2014), <http://centerforfoodsafety.com/issues/304/pollinators-and-pesticides/press-releases/2995/half-a-million-demand-action-from-epa-to-save-bees>.

<sup>4</sup> See Reports, Center for Food Safety, *Water Hazard: Aquatic Contamination by Neonicotinoid Insecticides in the United States* (September 16, 2015), <http://www.centerforfoodsafety.org/reports/4048/water-hazard-aquatic-contamination-by-neonicotinoid-insecticides-in-the-united-states>.

prothioconazole, and the materials received via this FOIA request will contribute to that report, which will be disseminated to its members and made available to the larger public.

Federal courts have found that dissemination to 2,500 people through a newsletter and the intent to start a website is sufficient to meet the “reasonably broad audience” factor. *Forest Guardians v. U.S. Dep’t of Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005). Moreover, they have found that the proven ability to digest and disseminate highly technical information, as demonstrated by past analysis and dissemination, merits giving nonprofit organizations fee waivers. *See W. Watersheds Project v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004). CFS’s activity in these respects far outstrips any minimums established by judicial interpretation.

Simultaneously, this FOIA will help CFS fulfill its well established function of public oversight of government action. Public oversight of agency action in particular is a vital component in our democratic system and is the bedrock upon which the FOIA stands. CFS has made comments to EPA on the potential catastrophic effects of increased 2,4-D use due to new genetically engineered crop approval and the re-registration of the pesticide glyphosate. CFS has also commented to the EPA on numerous pesticide new use approvals. The information sought in this current request will help enhance CFS’s understanding of EPA’s assessment of systemic fungicides and improve its function of providing public oversight.

**D. The disclosure is likely to contribute significantly to public understanding of government operations or activities.**

The disclosure is likely to contribute significantly to public understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure. 40 C.F.R. § 2.107(l)(2)(iv).

CFS employs science and policy experts,<sup>5</sup> who have analyzed FOIA, NEPA, and other environmental and scientific reports for their entire careers. CFS puts out reports on pesticides, genetically engineered foods, food and feed additives, and other topics that tend to be difficult for the layperson to understand without professional assistance.<sup>6</sup> To that end, disclosure will result in an enhanced understanding of fungicides for the public.

**II. Obtaining the information is of no commercial interest to CFS.**

The Center for Food Safety is a 501(c)(3) non-profit environmental advocacy organization that works to address the impacts of our food production system on human health,

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<sup>5</sup> See Leadership, Center for Food Safety, <http://www.centerforfoodsafety.org/staff> (last visited June 24, 2014).

<sup>6</sup> See Publications & Resources, Center for Food Safety, <http://www.centerforfoodsafety.org/reports> (last visited June 24, 2014).

animal welfare and the environment. CFS works to achieve its goals through grassroots campaigns, public education, media outreach, and litigation. Under FOIA, a commercial interest is one that furthers a commercial, trade, or profit interest as those terms are commonly understood. *See e.g.*, OMB Fee Guidelines, 52 Fed. Reg. 10017-18. Such interests are not present in this request. In no manner does CFS seek information from the EPA for commercial gain or interest. CFS respectfully files this FOIA request pursuant to its goal of educating the general public on the adverse effects of industrial agriculture. Upon request and free of charge, CFS will provide members of the public with relevant information obtained from the EPA

Based upon the foregoing, CFS requests that this FOIA be classified within the EPA's fee waiver category and that FDA send the requested information as required by law. As this is a matter of extreme importance to CFS, we look forward to your reply within twenty working days as required by FOIA. 5 U.S.C. § 552(a)(6)(A)(i). If the responsive records are voluminous please contact me to discuss the proper scope of the response. If any exemption from FOIA's disclosure requirement is claimed, please describe in writing the general nature of the document and the particular legal basis upon which the exemption is claimed. Should any document be redacted, please indicate the location of the redaction through the use of black ink.

Please provide any and all non-exempt portions of any document which may be partially exempt due to some privilege as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

Please send all materials to the San Francisco address on the letterhead. Please call me at (415) 826-2770 if you have any further questions about this request.

Sincerely,

Sylvia Wu  
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Center for Food Safety  
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San Francisco, CA 94111  
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/s/

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Sylvia Wu